(b)(6)

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUN 17 2013 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(20

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed with a finding of fraud and willful misrepresentation against the petitioner.

The petitioner sought to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2) as an advanced degree professional. As required by statute, a labor certification accompanied the petition. Upon reviewing the petition, the director determined that the job offer was not *bona fide* and denied the petition accordingly.

The AAO issued a Notice of Intent to Deny (NOID) and Notice of Derogatory Information on April 11, 2013. The AAO specifically alerted the petitioner that failure to respond to the NOID/NDI may result in the appeal being dismissed and that a request to withdraw may not prevent a finding of fraud or misrepresentation. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Because the petitioner failed to respond to the NOID/NDI, the AAO is dismissing the appeal. The AAO is also making a further finding of fraud and willful misrepresentation and invalidating the labor certification.

It must be noted that correspondence received by this office from the beneficiary requested that the case be closed and the petition filed by the petitioner for the beneficiary be withdrawn. The beneficiary has no standing to request a withdrawal. *See* 8 C.F.R. § 103.3(1)(iii)(B). No correspondence from the petitioner has been received.[1] The AAO issued a NOID/NDI on April 11, 2013 informing the petitioner of doubts concerning the *bona fide* nature of the job offer and the nature of the petitioner's business.[2] The NOID advised the petitioner that:

> The AAO hereby issues this Notice of Intent to Deny and Notice of Derogatory Information pursuant to 8 C.F.R. § 103.2(b)(16)(i) the petition and informs the petitioner of derogatory information pertinent to this proceeding, pursuant to 8 C.F.R. § 103.2(b)(16) which provides in relevant part:
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> (i) *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [U.S. Citizenship and Immigration

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[1] Online state corporation records reflect that the petitioning business is inactive. Where there is no active business, no *bona fide* job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

[2] The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ,* 381 F.3d 143, 145 (3d Cir. 2004).

> Services (USCIS)] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

The petition was accompanied a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The priority date as set forth on the Form ETA 750 is October 15, 2004.[3] It is additionally noted that the Form I-140 was signed by as CEO . . . The address given for the petitioner on the Form I-140 is 50322. The address given for the petitioner on the Form ETA 750 was

The director of the Nebraska Service Center denied the petition on June 2, 2010 after determining that the petitioner had not made a *bona fide* job offer to the beneficiary. The director cited to an April 21, 2010 USCIS site visit at the address listed on the I-140 petition where it was found that only two clerical workers were employed at that location. Additionally, as stated in the director's denial, the employees indicated that "no one else, other than a former clerical employee, had ever worked there." When asked about the activities conducted at the office, one of the employees said that she does "mostly bookkeeping and accounting, and the other said that she does payroll, accounts, payment follow up and invoice processing." As the information from the site visit called into question the *bona fides* of the petition, which listed the Iowa address as the work location (as well as various unanticipated locations throughout the U.S.), the director issued a Notice of Intent to Deny ("NOID"). The NOID expressed concern that the address listed on the petition, the location of the site visit, was in Iowa and that no more than two clerical employees at a time have ever worked at that location, while the job offered to the beneficiary was as a Software Engineer. In response, the petitioner submitted evidence, which included its Iowa Articles of Incorporation, Iowa State taxes, Form 941 Quarterly Reports, and asserted that the labor certification covered work in various unanticipated locations. In the director's decision to deny the petition, she notes that the claimed Iowa "headquarters," based on information obtained from the site visit, was deficient to meet the standard of headquarters pursuant to BALCA Field Memorandum 48-94, and, therefore, the job offer stated in Iowa at the "headquarters" was not a *bona fide* job offer.

[3] The priority date is the day the Form ETA 750 was accepted for processing by any office within DOL's employment system.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is noted that the regulation at 20 C.F.R. § 656.30(c)(2) provides:

A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the *Application for Alien Employment Certification* (Form ETA 750) or the *Application for Permanent Employment Certification* (Form ETA 9089).

With regard to the current proceeding, section 204(b) of the Act states, in pertinent part, that:

> After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

A labor certification is subject to invalidation by USCIS if it is determined that fraud or a willful misrepresentation of a material fact was made in the labor certification application. *See* 20 C.F.R. § 656.30(d) which states the following: "After issuance

labor certifications are subject to invalidation by [USCIS] . . . upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application."

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

Following an investigation and plea agreement, the petitioner, through its President, pled guilty on April 11, 2011, to violating 18 U.S.C. section 1001(a)(3) for making false statements to a governmental agency. Based on the agreement, the petitioner agreed not to file any new applications. In connection with the investigation and presentence Investigative Report seized documents included altered Form(s) I-797s, altered documents relating to Form(s) I-129s and an I-140 for an employee, and many altered W-4s and I-9s designed to show that the aliens were living in Iowa at false addresses. A site visit to Iowa location indicated that it was a virtual office with two clerical staff. Photographs submitted in response to a request for evidence in another matter ( ) were not of the Iowa office as represented and the clerical staff could not identify most of the persons photographed. Job announcements were not posted for permanent labor certification filings as regulatorily required. As indicated by a plea agreement entered into by in conjunction with the entry of a guilty plea of making a false statement in support of the filing of an I-140[4] and related labor certification, as well as a presentence investigation report submitted by the petitioner's counsel:

1) caused Labor Condition Applications (LCAs) for nonimmigrant workers to be submitted the United States Department of Labor (DOL), which contained false representations as to work locations for the nonimmigrant workers. Proper notice of jobs were not posted and proper notice of jobs were not posted at the worksite location where the workers actually performed work;
2) and its agents and employees regularly submitted quarterly reports to the Iowa Workforce Development office which claimed individuals worked in (Iowa) when the actual work location was elsewhere;
3) Application for Permanent Employment Certification containing material omissions relating to the fact that workers worked for different companies,

[4]), one of 's owners, pled guilty to violation of 8 U.S.C. § 1306(b), relating to failure to notify change of address and voluntarily departed the United States on June 19, 2011.

pursuant to third party contracts, and that workers were employed as consultants assigned to other companies. False documents, including W-2 forms were submitted, falsely representing the residential addresses of nonimmigrant workers;

4) False information related to and was submitted inasmuch no bona fide job opportunity existed when the Iowa Department of Labor certified the ETA Form 9089 submitted by PWC;

   Between October 18, 2006, and January 31, 2008, a owner, submitted Employer's Contribution and Payroll Reports on six occasions to Iowa Workforce Development, which represented a false employer address in , Iowa, and represented the purported Iowa wages for over 50 employees;[5]

5) On three more occasions between March 22, 2007, and December 20, 2007, Iowa employee submitted Forms I-140 and accompanying ETA Form 9089s and prevailing wage determinations from Iowa Workforce Development for , and to the Nebraska Service Center, falsely representing a work location of Iowa;

6) A letter obtained pursuant to seized documents instructing aliens what would be needed to establish their eligibility including instructions that the experience letters should be created showing skills from newspaper ads. Specifically, the letter stated that alien should have a "Co-worker affidavit or your experience letters should show at least five skills listed in the newspaper ad enclosed."[6] [sic]

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289-90 (BIA 1975). "The intent to deceive is no longer required before the willful misrepresentation charge comes into play." *Id.* at p. 290. The term "willfully" means knowing and intentionally, as distinguished from accidentally inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild,* 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry

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[5] Altered documents and W-2 statements call into question evidence submitted in support of the petitioner's ability to pay the proffered wage, and even if the petitioner were not denied on the basis of the lack of a *bona fide* job offer, the petitioner would not be able to establish its ability to pay pursuant to 8 C.F.R. § 204.5(g)(2) without resolution of the substantial discrepancies and evidence of altered financial documents.

[6] This evidence calls into question documents related to the beneficiary's claimed experience and the petition would be denied on this basis as well.

which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng,* 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government: 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-,* 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-,* 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui,* 15 I&N Dec. at 288.

A finding of fraud requires a determination that the alien made a false representation of fact of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed an acted upon by the officer. *See Matter of G-G-,* 7 I&N Dec. 161 (BIA 1956).

Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.) It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Id.*

Accordingly, based on the admissions in the site visit and presentence investigation report, the petitioner reported false information to report employees and wages for employees not employed in Iowa, and submitted such documentation to USCIS and DOL in support of its filing. The documents materially misrepresented the true nature of the employer's headquarters, and that the job offer constituted a *bona fide* job offer.

Based on the foregoing, the AAO intends to affirm the denial of the petition and dismiss the appeal with a finding of fraud and/or material misrepresentation against the petitioner. A finding of misrepresentation or fraud may lead to invalidation of the labor certification (Form ETA 750). *See* 20 C.F.R. 656.30(d).

Based on the foregoing, the AAO finds that the petition was filed based on fraud and willful misrepresentation that the petitioner was a legitimate business making a valid job offer to the alien. The AAO finds that the petition's representations constitute fraud and willful material[7] misrepresentation that a *bona fide* job offer was extended.[8]

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[7] United States Citizenship and Immigration Services (USCIS) may invalidate labor certifications where willful misrepresentation has occurred. Whether a petitioning business is a *bona fide* employer extending a real job offer and not operating solely to facilitate the procuring of

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the petition was filed based on fraud and willful misrepresentation by the petitioner that the job offer was a valid bona fide job offer. The AAO additionally invalidates the labor certification pursuant to 8 C.F.R. § 656.30(d).

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immigration benefits for a particular alien is a material misrepresentation where it shuts off a line of inquiry relevant to the alien's eligibility. *See Matter of S & B-C-*, 9 I&N Dec. 436 (A.G. 1961).

[8] A willful misrepresentation requires a knowingly made material misstatement to a government official for the purpose of obtaining an immigration benefit. *See Matter of Kai Hing Hui,* 15 I&N Dec. 288, 289-90 (B.I.A. 1975). To constitute a fraud, an alien must have made a false representation of a material fact, with knowledge of its falsity and with an intent to deceive a government official, and the misrepresentation must have been believed and acted upon by the official. *See Matter of GG-*, 7 I&N De. 161, 164 (B.I.A. 1975).